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BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
)  
Implementation of Section 25 )  
of the Cable Television Consumer )  
Protection and Competition Act of 1992 )  
)  
Direct Broadcast Satellite )  
Public Service Obligations )

MM Docket No. 93-25

**COMMENTS OF CHILDREN'S TELEVISION WORKSHOP**

Children's Television Workshop ("CTW") hereby comments on the Notice of Proposed Rule Making, 8 FCC Rcd 1589 (1993), in this proceeding ("Notice"), pursuant to the FCC's January 31, 1997 Public Notice (FCC 97-24) inviting comments to refresh the record.

In these Comments, CTW, the producer of "Sesame Street" and other popular children's educational video programming, proposes a linkage between the public service obligations of Section 25(a) of the 1992 Cable Act, and the four to seven percent educational programming "setaside" of Section 25(b) of that Act. Such a linkage is desirable because it would stimulate the production of quality educational children's programming, by making such production economically feasible.

**I. CHILDREN'S EDUCATIONAL PROGRAMMING SHOULD BE A COMPONENT OF THE SECTION 25(a) PUBLIC SERVICE OBLIGATION.**

In the 1992 Cable Act, Congress directed the FCC to impose "public interest or other requirements" on direct broadcast satellite ("DBS") providers that should, "at a minimum," include the political candidate access requirements of Sections 312(a)(7) and 315 of the Communications

Act. CTW urges the Commission to include the educational programming requirements of the Children's Television Act of 1990 among the public service obligations of DBS providers.

Beginning later this year, all television broadcasters will essentially be required to provide three hours per week, or the equivalent, of regularly-scheduled half-hour programs, a significant purpose of which is to address the educational and informational needs of children 16 and under.<sup>1</sup> Cable operators are required to carry most, if not all, of these local television broadcast signals, including their children's television programming. DBS providers, on the other hand, who have far greater channel capacity than broadcasters will have even in a digital television world, and as much or more capacity than cable systems, do not carry the children's (or other) programming of local stations,<sup>2</sup> nor will they be required, unless the FCC acts in this proceeding, to themselves provide any educational programming for children.

The Commission should, therefore, include a children's programming requirement among the Section 25(a) obligations of DBS providers. To limit such providers' public service obligations to the sporadically-invoked political access requirements identified in Section 25(a) would render the provision almost nugatory, an unfair result given the major contributions of both the broadcast and cable industries toward addressing children's educational needs.

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<sup>1</sup> 47 C.F.R. §73.671.

<sup>2</sup> Currently, DBS providers cannot carry local television broadcast stations at all, because the copyright law: (i) bars them from offering network television service (including PBS service) to customers located within the Grade B contours of local network-affiliated and noncommercial broadcast stations, and (ii) fails to authorize the delivery of independent local television stations to DBS customers in any location. 17 U.S.C. §119. Even if the copyright law were amended to delete these restrictions, there is little likelihood that carriage of all local broadcast signals would be mandated, rather than merely being permitted.

CTW specifically proposes that DBS providers be required to supply three percent of their activated channel capacity or two channels, whichever is less, as children's educational channels, containing exclusively, from 7 a.m. to 10 p.m., programming a significant purpose of which is to serve the educational and informational needs of children 16 and under. The programming should consist of regularly-scheduled 30-minute or longer programs, identified as educational at the beginning of their airing, and elsewhere in print. Indeed, the proliferation of channel options confronting the typical DBS subscriber requires that the DBS provider affirmatively inform its potential audience of where and when the qualifying channels can be found. This information, as well as each program's educational objective and the age of its target audience, should be included in the program listings sent by the provider to its customers, and in all marketing materials.

CTW's proposal is intended to be analogous to the public service obligation currently imposed on terrestrial broadcasters with respect to children's educational and informational programming. Unlike terrestrial broadcasters, DBS providers control the distribution of scores of channels -- the most recent projections are that the average DBS provider will have hundreds of channels at its disposal (ASkyB is contemplating 500 channels, while PrimeStar will shortly have 160).<sup>3</sup> Because the number of hours of programming provided by DBS providers is, even in a 100-channel DBS paradigm, of an order of magnitude far greater than that provided by terrestrial broadcasters, DBS providers should be obligated to provide commensurately more children's educational programming than their terrestrial broadcasting counterparts to render meaningful compliance with Section 25(a)'s public service obligation.

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<sup>3</sup> "Local retransmission: Pie in the Sky?," "PrimeStar arms for battle," Broadcasting & Cable at 42, 44 (Mar. 3, 1997).

The television broadcasting processing guideline adopted last year effectively requires terrestrial broadcasters to provide educational programming on three percent of their available 7 a.m. to 10 p.m. "capacity" (3 hours/105 hours per week = 3%). CTW believes that DBS providers should be obligated to provide the same percentage of their available channel capacity to earn comparable treatment vis-a-vis compliance with Section 25(a) -- three percent.

Because DBS providers have or are likely to have channel capacity exceeding 150 channels, however, a lack of qualifying programming may make it infeasible for them to meet such a processing guideline. Accordingly, CTW proposes that the three percent guideline be capped at a total of two fulltime educational children's channels, at least for the next five years. At that time, if available children's educational programming channels emerge in the marketplace, the FCC should revisit whether the cap can be increased.

The proposed DBS children's programming requirement would function just as it does with broadcasters: the DBS provider would select, purchase and air programs, or prepackaged program services, that it deems qualified. The children's educational channels could be programmed by the provider itself, by an affiliate, or by any for-profit or non-profit entity. Because they could contain commercial material, their production by entities such as CTW would be economically feasible. The DBS provider would have ultimate responsibility for its material aired in fulfillment of its children's educational programming requirement.

In Time Warner Entertainment Co. v. FCC,<sup>4</sup> the Court upheld the constitutionality of the Section 25(b) educational programming setaside, on the grounds that a less vigorous standard of First Amendment scrutiny applies where the government imposes content restrictions on a medium

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<sup>4</sup> D.C. Circuit No. 93-5349 (Aug. 30, 1996).

of expression that utilizes spectrum for which the demand far exceeds the available supply.<sup>5</sup> CTW's proposed children's educational programming requirement passes constitutional muster for the same reason.

**II. THE SECTION 25(b) SETASIDE OBLIGATION MUST BE FULFILLED BY PROGRAMMING PRODUCED BY NON-PROFIT ENTITIES, BUT SHOULD BE REDUCED IF SECTION 25(a) EDUCATIONAL CHILDREN'S PROGRAMMING IS ACQUIRED FROM NON-PROFIT PROGRAM SOURCES.**

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Rather than assume, as the Notice does,<sup>6</sup> that compliance with the Section 25(b) reservation for noncommercial programming, together with implementation of the Sections 312(a)(7) and 315 political broadcasting requirements, will fully satisfy the Section 25(a) public service obligation, the FCC should reverse the presumption, and thereby benefit both viewers and DBS providers. CTW proposes that compliance with the recommended educational children's programming component of Section 25(a) by means of programming produced by non-profit rather than for-profit entities should merit relief from the Section 25(b) setaside requirement, as set forth below.

**A. DBS Providers Should Be Relieved Of A Portion Of The Four To Seven Percent Setaside Requirement If They Satisfy Their Section 25(a) Children's Programming Requirement With Programming Produced by Non-Profits.**

Section 25(b) of the 1992 Cable Act requires DBS providers to reserve four to seven percent of channel capacity "exclusively for noncommercial programming of an educational or informational nature" that is provided by certain noncommercial entities and educational institutions. Like cable

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<sup>5</sup> Id. at 28-30.

<sup>6</sup> Notice, 8 FCC Rcd at 1595.

operators required to provide commercial leased access capacity, DBS providers cannot exercise editorial control over the programming aired in fulfillment of this requirement, but can use the setaside themselves for any purpose until it is used for the statutory purpose.<sup>7</sup>

Programmers such as CTW are less than sanguine about the setaside, because they fear it is not economically viable for them to utilize. CTW, for example, while qualifying to supply programming for the reserved DBS capacity, would find it difficult to do so given DBS' currently limited nationwide subscriber volume, absent the ability to include commercial matter within the setaside programming.

DBS providers also are unhappy with the required educational reservation. In comments filed in the prior phase of this proceeding, they objected to the absence of editorial control over the setaside programming, and sought to treat the setaside itself as more akin to a broadcaster's obligation to air issue-responsive public affairs programming of its own choice than to the leased access-like scheme that Congress clearly envisioned.<sup>8</sup>

To benefit programmers, DBS providers, and most importantly, children and parents, CTW believes that where a DBS provider complies with CTW's suggested three percent or two-channel children's educational programming requirement under Section 25(a) by offering children's educational channels that are programmed by non-profit entities eligible for the Section 25(b) setaside capacity, that provider should receive a commensurate reduction in its setaside requirement. For example, the setaside could be set at seven percent (e.g., seven channels if the provider has 100)

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<sup>7</sup> See 47 U.S.C. §612(b)(4), (c)(2). For this reason alone, the setaside should not be deemed a substitute for the DBS provider's own public service obligations under Section 25(a).

<sup>8</sup> See, e.g., Comments of DirecTV at 23.

if the provider fulfills the minimum requirement (or processing guideline) under Section 25(a) by offering children's educational programming provided by a for-profit commercial programmer, but be reduced by one percent (or one channel, in this example) for each children's channel offered in fulfillment of the Section 25(a) requirement that is programmed by a non-profit entity eligible to utilize the setaside capacity, down to the four percent minimum required by the statute.<sup>9</sup>

The Commission's Rules provide an analogous precedent for such reduction of a setaside requirement by the purchase of programming of the multichannel provider's own choice, within certain limitations. Pursuant to Rule 76.977, a cable operator may reduce its leased access channel setaside obligation by up to 33 percent by using such capacity for programming of its own choosing from qualified educational or minority programming sources. Thus, for example, a cable system with 120 activated channels, required by Section 612(b)(1)(C) of the Communications Act to designate 15 percent of its capacity (or 18 channels) for leased access by unaffiliated entities, may reduce that leased access requirement to 12 channels by utilizing six channels for the provision of programming from a qualified educational or minority programming source. Just as the cable leased access setaside can be reduced by a maximum of 33 percent, under CTW's proposal the Section 25(b) leased noncommercial access setaside could never be reduced below the four percent statutory minimum.

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<sup>9</sup> Where only a fraction of a Section 25(a) educational children's channel is programmed by a non-profit entity, the Section 25(b) reduction would be the same fraction of one percent. Thus, if 50% of a Section 25(a) channel were programmed by a non-profit, the reduction in the DBS provider's Section 25(b) setaside obligation would be one-half of one percent.

**B. Only Programming Controlled By Non-Profit Organizations Qualifies For The Setaside, But Such Organizations Should Be Permitted To Produce Qualifying Programming In Partnership With Commercial Entities And To Include Commercial Matter Within Qualifying Programming, While DBS Providers Should Be Permitted To Select From Among Qualified Programmers Where Demand Exceeds Setaside Capacity.**

Under Section 25(b), the obligation to reserve capacity for noncommercial educational programming is not one to be fulfilled in any manner the DBS provider chooses, but is more akin to commercial leased access on cable systems: the statute demands that the provider “shall meet the requirements” of Section 25(b) by “making channel capacity available to national educational programming suppliers” at prices limited to 50 percent of total direct costs, without “exercis[ing] any editorial control over any video programming provided pursuant to this subsection.”<sup>10</sup>

Furthermore, the statute defines “national educational programming suppliers” to include “any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions.”<sup>11</sup> CTW agrees with the Commission that these terms should be defined as they are in Section 397 of the Communications Act and in the FCC’s ITFS rules, and should also encompass “public broadcasting entities” as defined in Section 397.<sup>12</sup> Importantly, these definitions limit all such entities to non-profit institutions. Particularly given the statutory emphasis on reasonable access costs and the requirement that in determining such costs, the Commission “shall take into account the non-profit character of the programming

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<sup>10</sup> 47 U.S.C. §335(b)(3), (b)(4)(B) (emphasis added); compare 47 U.S.C. §532.

<sup>11</sup> 47 U.S.C. §335(b)(5)(B).

<sup>12</sup> Notice, 8 FCC Rcd at 1597. A “public broadcasting entity” includes, inter alia, “any non-profit institution engaged primarily in the production, acquisition, distribution, or dissemination of educational and cultural television or radio programs.” 47 U.S.C. §397(11). Thus, the term encompasses such entities as PBS and CTW.

provider,”<sup>13</sup> it is clear that Congress intended that programming entitled to utilize the setaside be provided by bona fide non-profit organizations only.

However, to make economically feasible the production of qualifying programming for distribution on direct broadcast satellites, the Commission should permit non-profit organizations to undertake partnerships and joint ventures with commercial entities for the purpose of producing such programming, so long as the non-profit organization either has editorial control over the programming produced, or shares such control equally with its for-profit partner.

Moreover, CTW proposes that qualifying noncommercial entities and educational institutions be permitted to include commercial matter in the setaside channels’ programming in accordance with the advertising limitations mandated by the Children’s Television Act, until such time as subscriber fees increase sufficiently to cover the costs of creating programming for, gaining access to, and operating such setaside channels. Otherwise, even given the statutory requirement that prices for access to the setaside channels be limited to 50 percent of the direct costs of making such channels available, the non-profit educational programming providers that qualify to use setaside channels will not be able to afford to do so.

In addition, just as a cable operator may select those local commercial television stations it will carry where more such stations are entitled to mandatory carriage than the cable system is required to accommodate,<sup>14</sup> DBS providers should be permitted to select from among qualifying “national educational programming suppliers” where demand for the setaside exceeds its supply.

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<sup>13</sup> 47 U.S.C. §335(b)(4)(A).

<sup>14</sup> 47 U.S.C. §534(b)(2).


## CONCLUSION

To meet their Section 25(a) public service obligation, the FCC should require DBS providers to provide three percent of channel capacity, up to a maximum of two fulltime channels, for programming designed to meet the educational and informational needs of children. To the extent that DBS providers meet that requirement with programming provided by non-profit entities, they should be permitted to reduce commensurately their Section 25(b) obligation to reserve channel capacity for educational programming.

Programming that fulfills the Section 25(b) setaside (as reduced for fulfillment of the Section 25(a) children's programming obligation with programming derived from non-profits) must be provided only by bona fide non-profit organizations, as Congress intended, but these organizations should be permitted both to produce such programming through joint ventures with commercial entities (so long as the non-profit entities exercise positive or shared control over the editorial content), and to support such programming by the inclusion of commercial matter as needed. Finally, where demand for the setaside capacity exceeds supply, DBS providers should be permitted to select which qualified providers shall utilize that capacity.

Respectfully submitted,

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